United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

Press Release . Communiqué de presse
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APPEALS CHAMBER
CHAMBRE D'APPEL
The Hague, 11 December 2002
JL / P.I.S / 715-e

THE PROSECUTOR V. RADOSLAV BRĐANIN & MOMIR TALIĆ
"RANDAL CASE"

APPEALS CHAMBER DEFINES A LEGAL TEST FOR THE ISSUANCE OF SUBPOENAS FOR WAR CORRESPONDENTS TO TESTIFY AT THE TRIBUNAL

Subpoena to Jonathan Randal set aside

Please find below a summary of the Decision rendered today by the Appeals Chamber consisting of Judge Claude Jorda (Presiding), Judge Mohamed Shahabuddeen, Judge Mehmet Guney, Judge Asoka de Zoysa Gunawardana and Judge Theodor Meron. This summary was read out in court by the Presiding Judge.

The Appeals Chamber is rendering its Decision today on an interlocutory appeal filed in the *Brđanin/Talić* case by counsel for Mr Jonathan Randal, a journalist who spent several years working for the daily newspaper *The Washington Post* (hereinafter "the Appellant").

The Appeals Chamber points out that the text read in this hearing is not the authoritative text of the Decision which will be distributed at the end of the hearing.

Before presenting the Appeals Chamber Decision, I will recall in brief the background of the case and set out in short the main stages of the proceedings:

The case stems from a decision rendered on 29 January 2002 by Trial Chamber II in the *Brđanin/Talić* case.

In the Decision, at the request of the Prosecution and pursuant to Rule 54 of the Rules of Procedure and Evidence, the Trial Chamber issued a confidential "Subpoena" compelling Mr Randal to testify at trial.

Mr Randal stated his opposition to the Subpoena in a written motion. The Trial Chamber then heard the arguments of Mr Randal and the Prosecution regarding the motion to set aside the Subpoena. On 7 June 2002, in its "Decision on the Motion to Set Aside the Confidential Subpoena to Give Evidence", the Trial Chamber confirmed the Subpoena issued to Mr Randal.

After the Trial Chamber certified that Mr Randal's interlocutory appeal was appropriate, he filed an appeal on 26 June 2002. On 1 August 2002, pursuant to Rules 74 and 107 of the Rules, the Appeals Chamber granted the request of 34 press companies and associations of journalists to file a brief as *Amici Curiae* in support of the appeal, which was filed on 16 August 2002.

Further to a request of Mr Randal and the *Amici Curiae*, the Appeals Chamber heard the oral arguments of the parties and the *Amici Curiae* on 3 October 2002.

What was the decision of the Trial Chamber challenged on appeal by Mr Randal?

To confirm the appropriateness of the Subpoena, the Trial Chamber acknowledged that "journalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and realities of the conflict" and that they should not be "subpoenaed unnecessarily." However, given that the testimony sought concerns already published materials and

already identified sources, the Trial Chamber held that compelling the testimony of journalists poses only a minimal threat to the news gathering and news reporting functions. Indeed, the Trial Chamber found that a published article is the equivalent of a public statement by its author and that when such a statement is entered in evidence in a criminal trial and its credibility challenged, the author, like anyone else who makes a claim in public, must expect to be called to defend its accuracy. In determining whether to issue a subpoena to compel the testimony of a journalist concerning already public materials and sources, the Trial Chamber thus held that it is sufficient if the testimony sought is "pertinent" to the case.

What are the main arguments raised by the parties before the Appeals Chamber?

Mr Randal seeks the reversal of the Impugned Decision and the setting aside of the Subpoena. He submits that in this instance the Trial Chamber committed two errors:

(i) first error: the Trial Chamber allegedly erred in refusing to recognise a qualified testimonial privilege for journalists.

Such a privilege is warranted, the Appellant contends, in order to safeguard the ability of journalists to investigate and report effectively on events occurring in areas in which war crimes take place. Without a qualified privilege, journalists may be put at risk personally, may expose their sources to risk and may be denied access to important information and sources in the future. The result, in the Appellant's view, will be less journalistic exposure of international crimes and thus the hindering of the very process of international justice that international criminal tribunals such as this Tribunal are designed to serve. In support of these contentions, the Appellant submits statements from two journalists, the general secretary of the International Federation of Journalists, and the publisher of the *Washington Post*.

(ii) second error: the Trial Chamber allegedly erred in not finding, on the facts of this case, that the Appellant should not be compelled to appear for testimony.

The Appellant states that his testimony cannot materially assist the Prosecution or the Defence because, in particular, he cannot vouch for the statements attributed to the accused in his article since the interview was conducted through another journalist. Moreover, the Appellant asserts that the Trial Chamber should have undertaken a careful analysis of the importance of his testimony before issuing the subpoena, not just after the fact.

The Amici Curiae make largely the same arguments as the Appellant concerning the importance of a qualified privilege to ensuring journalists' ability to investigate in and report on events occurring in areas where war crimes are taking place. According to the *Amici Curiae*, a Trial Chamber should not issue a subpoena to compel the testimony of a journalist unless it determines that: (1) the testimony is essential to the determination of the case given that, for this condition to be satisfied, the testimony must be "critical to determining the guilt or innocence of a defendant" and (2) the information cannot be obtained by any other means. The *Amici Curiae* concludes that these conditions are not satisfied in this case.

The Prosecution submits that the Trial Chamber: (i) correctly declined the Appellant's invitation to create a precise journalistic privilege; and (ii) correctly determined, on the facts of this case, that the Appellant should be compelled to testify. The Prosecution argues that, whatever beneficial effects a privilege for the protection of confidential sources and information may have in promoting reporting which may serve the cause of international justice, no such benefits accrue from a privilege protecting testimony concerning published materials and openly identified sources. The Prosecution stresses that this case fits in the latter category and consequently that the risks for journalists do not arise from the possibility of being called to testify. Moreover, the Prosecution contends that too generous a privilege could compromise the due process rights of accused persons.

Having recalled the arguments of the parties, the Appeals Chamber now renders its decision:

At the outset, the Appeals Chamber notes that, although the parties and the *Amici Curiae* frame the issue before the Appeals Chamber as one concerning journalists in general, the case really concerns a smaller group, namely, war correspondents. It is the particular character of the work done by those who cover the events occurring in the conflict zones and the risks they face that it is at stake in the

present case. By "war correspondents," the Appeals Chambers means individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict.

In the Appeals Chamber's view, the basic legal issue presented raises three subsidiary questions. Is there a public interest in the work of war correspondents? If so, would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work? If so, what test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the Chamber and, where it is implicated, the right of the defendant to challenge the evidence against him? The Appeals Chamber considers each of these questions in turn.

1. Is there a public interest in the work of war correspondents?

The Appeals Chamber is of the view that the answer to the first question is clearly "Yes", as the Trial Chamber expressly recognised.

The Appeals Chamber is of the view that society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents. Wars necessarily involve death, destruction, and suffering on a large scale and, too frequently, atrocities of many kinds, as the conflict in the former Yugoslavia illustrates. The transmission of that information is essential to keeping the international public informed. It may also be vital to assisting those who prevent crimes under international humanitarian law, such as those that fall within the jurisdiction of this Tribunal. In this regard, it may be recalled that the images of the terrible suffering of the detainees at the Omarska Camp that played an important role in the process of awakening the international community to the seriousness of the human rights situation during the conflict in Bosnia and Herzegovina were broadcast by war correspondents. The Appeals Chamber therefore readily agrees with the Trial Chamber that war correspondents "play a vital role in bringing to the attention of the international community the horrors and reality of conflict." The information uncovered by war correspondents has on more than one occasion provided important leads for the investigators of this Tribunal. The Appeals Chamber has no hesitation in finding that war correspondents do serve a public interest.

It follows that recognition of the important public interest served by the work of war correspondents does not rest on a perception of war correspondents as occupying some special professional category.

2. Would compelling war correspondents to testify in a war crimes tribunal adversely affect their ability to carry out their work?

The Appeals Chamber acknowledges that it is impossible to determine with certainty whether and to what extent compelling war correspondents to testify before the International Tribunal could hamper their ability to work. However, in the opinion of the Appeals Chamber, it is not a possibility that can be discarded, as the Trial Chamber found, simply because the evidence sought supposedly concerned published information and not confidential sources. The potential impact upon the newsgathering function and safety of war correspondents as submitted by the Appellant and the *Amici Curiae* is great.

For the Appeals Chamber, what really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information. To publish the information obtained from the interviewee is one thing - it is indeed often the very purpose for which the interviewee gave the interview - but to testify against the interviewed person on the basis of that interview is quite another. The consequences for the interviewed person are much worse in the latter case, as they may be found guilty of war crimes and deprived of their liberty. If war correspondents were to be perceived as potential witnesses for the Prosecution, two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.

As such, the Appeals Chamber is of the view that compelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public.

3. What test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court?

The Appeals Chamber considers that in order to decide whether or not to compel a war correspondent to testify before the International Tribunal a Trial Chamber must conduct a balancing exercise between the differing interests involved in the case. On the one hand, there is the interest of justice in having all relevant evidence put before the Trial Chambers for a proper assessment of the culpability of the individual on trial. On the other hand, there is the public interest in the work of war correspondents.

The test of "pertinence" applied by the Trial Chamber appears insufficient to protect the public interest in the work of war correspondents. The word "pertinent" is so general that the test could not grant war correspondents any more protection than that enjoyed by other witnesses. Thus, the Trial Chamber's test, while supposedly accounting for the public interest in the work of war correspondents, would actually leave that interest unprotected. On the other hand, the test proposed by the Appellant, as noted above, would amount to a virtually absolute privilege and even the criteria proposed by *Amici Curiae* may be too stringent in that they may lead to significant evidence being left out.

In the opinion of the Appeals Chamber, it is only when the Trial Chamber finds that the evidence sought by the party seeking the subpoena is direct and important to the core issues of the case that it may compel a war correspondent to testify before the International Tribunal. The adoption of this criterion should ensure that all evidence that is really significant to a case is available to Trial Chambers. Moreover, it should prevent war correspondents from being subpoenaed unnecessarily.

Let us clarify this criterion.

The Appeals Chamber holds that in order for a Trial Chamber to issue a subpoena to a war correspondent a two-pronged test must be satisfied. First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.

Finally, beyond a number of observations in the Decision, the Appeals Chamber will not address the submissions of the parties on the second ground of the appeal, that is, the application of the proper legal test to the facts. Having actually determined the principles governing the testimony of war correspondents before the International Tribunal, the Appeals Chamber considers that it is the role of the Trial Chamber to apply those principles in the particular circumstances of the case should the court be seized of the matter again.

For the foregoing reasons, the Appeals Chamber:

(1) allows the Appeal;

(2) reverses the Impugned Decision; and

(3) consequently, sets aside the Subpoena.

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The full text of the Decision is available upon request from the Public Information Services of the ICTY. It is also available on the ICTY Internet site: www.un.org/icty